

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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WASHINGTON, D.C. 20554

In the Matter of)
Statement of the Public) PR File No. 94-SP7
Utilities Commission of)
Ohio's Intention to)
Preserve Its Right for)
Future Rate and Market)
Entry Regulation of)
Commercial Mobile)
Radio Services)

To: The Commission

**OPPOSITION OF NEW PAR TO THE STATEMENT OF THE
PUBLIC UTILITIES COMMISSION OF OHIO'S
INTENTION TO PRESERVE ITS RIGHT FOR
FUTURE RATE AND MARKET ENTRY REGULATION OF
COMMERCIAL MOBILE RADIO SERVICES**

New Par, by its attorneys, respectfully submits its Opposition to the "Statement of the Public Utilities Commission of Ohio" ("PUCO Statement") and moves the Commission to deny the pleading for insufficient grounds to support any claim for continued rate regulation of commercial mobile radio services ("CMRS") in Ohio.¹

The PUCO Statement fails to make the requisite statutory showing demonstrating why continued rate regu-

¹ New Par, through partnerships or subsidiaries, is the nonwireline cellular service provider in 16 MSAs and RSAs in Ohio and therefore has standing as an interested party in this proceeding.

lation is required to protect subscribers from unjust and unreasonable rates or unreasonably discriminatory rates. In fact, the PUCO does not even request authority to continue to regulate cellular rates, but rather seeks only "to preserve the rights of Ohio" to regulate rates in the future² -- a right that already exists under the Communications Act. Accordingly, in order to remove any uncertainty over the CMRS regulatory environment in Ohio, New Par requests that Commission deny the PUCO's Statement on an expedited basis and confirm that the PUCO's power to regulate intrastate CMRS service rates has expired.

DISCUSSION

I. The PUCO Statement is Defective on its Face and Must Be Denied.

The PUCO Statement fails to meet the statutory requirement that States demonstrate in their petitions that continued rate regulation is required to protect subscribers.³ The Commission may grant States authority to continue existing rate regulation only "if the State satisfies the showing required" by the Omnibus Budget

² PUCO Statement at 2.

³ 47 U.S.C. § 332(c)(3)(A)-(B).

Reconciliation Act of 1993 ("Budget Act").⁴ This requires the PUCO to have demonstrated, by August 10, 1994, that market conditions with respect to cellular and other commercial mobile services fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory.⁵ Even a cursory reading of the PUCO Statement clearly demonstrates that the PUCO wholly failed to make any attempt to meet this statutorily mandated showing. Absent such a showing, the Commission is without authority to grant the PUCO Statement.⁶ Thus, the PUCO Statement is materially deficient on its face and must be denied.

Moreover, it is not entirely clear what rates the PUCO intends to continue to regulate. Effective August 10, 1994 the Budget Act preempts States from regulating "the entry of or the rates charged by any commercial mobile service"⁷ A State may continue to regulate rates only if (1) it regulated such rates on

⁴ Budget Act, Pub.L. No. 103-66, Title VI, § 6002(b)(2), 107 Stat. 312, 392 (1993) amending Section 332(c)(3) of the Communications Act.

⁵ 47 U.S.C. § 332(c)(3)(B).

⁶ 47 U.S.C. § 332(c)(3)(B).

⁷ 47 U.S.C. § 332(c)(2)(A).

June 1, 1993 and (2) petitioned the FCC by August 10, 1994 for authority to continue such rate regulation.⁸

Although the PUCO met the August 10 filing deadline, nowhere does the PUCO state that it was regulating rates as of the June 1 cut-off date. In fact, the PUCO Statement fails even to seek authority to continue rate regulation. Thus, to the extent that the PUCO may have had any rate regulations in effect as of the cut-off, such regulations have been preempted.⁹

II. Congress Preempted All State Rate Regulation -- Including Indirect Regulation of Rates Through the Complaint Process or Contract Review.

Although the PUCO claims that it "does not presently set rates,"¹⁰ it incredulously claims that its authority (and current exercise thereof) under Ohio law

⁸ 47 U.S.C. § 332(c)(3)(A)-(B). The PUCO's attempt to "preserve" its right to regulate market entry is moot. The Budget Act expressly preempts entry regulation and, unlike rate regulation, does not give the Commission authority to grant States relief. Thus, to the extent the PUCO requests any Commission action regarding entry regulation, that request must be denied.

⁹ Moreover, the PUCO's filing of its Statement may have violated Ohio's open meeting law, see Ohio Rev. Code § 121.22, because the decision to file was not preceded by notice to the public and was not made in a PUCO open meeting. If an Ohio court was to find that the filing of the Statement violated the open meeting law, the PUCO's filing could be held invalid.

¹⁰ PUCO Statement at 1.

to review the unreasonableness or discriminatory nature of a CMRS provider's rates through its complaint processes or review of carrier contracts is not preempted.¹¹

Section 332(c)(3)(A) is explicit in that "no State . . . shall have any authority to regulate . . . the rates charged by any commercial mobile service" unless the FCC grants such authority based on a showing that market conditions "fail to protect subscribers adequately from unjust and unreasonable rates or rates that are unjustly or unreasonably discriminatory."¹² The PUCO, however, claims that the Ohio Revised Code authorizes its regulation of certain CMRS rates notwithstanding the PUCO's failure to demonstrate that the requisite market conditions exist to support such regulation. This contention is wrong because it incorrectly assumes that a state legislative grant of regulatory authority alleviates the need for the PUCO to demonstrate to the FCC that the necessary market conditions exist to require

¹¹ See PUCO Statement at 3 (citing Sections 4905.26, 4905.33 and 4905.35, Ohio Revised Code). Further, the PUCO mistakenly asserts that its authority to regulate contractual arrangements, including roaming agreements, that affect rates is not preempted. See PUCO Statement at 2-3 (citing Section 4905.16, 4905.31 and 4905.48, Ohio Revised Code).

¹² 47 U.S.C. § 332((c)(3)(A) (emphasis added).

such regulation. The PUCO's authority to regulate rates, however, now must also come from the FCC -- not only Ohio law -- and such authority has not been (and, based upon the record submitted by the PUCO, cannot be) granted.¹³

Nothing in the legislative history supports the PUCO's contention that only certain forms of rate regulation are preempted. Thus, its power to regulate rates through review of CMRS inter-carrier contracts and its complaint or other administrative processes is equally preempted in light of its failure to make the necessary evidentiary showing.¹⁴

III. The PUCO's Attempt to "Preserve" a Future Right is Precluded by the Express Terms of the Budget Act.

The PUCO admits that it filed its Statement only "for the purpose of informing the FCC of the exist-

¹³ Although the PUCO correctly identifies the standard for imposing rate regulation, it fails to make even the slightest attempt to meet that standard. See PUCO Statement at 3.

¹⁴ The PUCO also states that its authority to regulate interconnection agreements is not preempted. PUCO Statement at 2. New Par does not contest this statement in that interconnection agreements between local exchange carriers and CMRS providers are not subject to this proceeding. In fact, they are the subject of another Commission proceeding. See Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54, Notice of Proposed Rule Making and Notice of Inquiry, released July 1, 1994.

ing Ohio regulatory framework . . . and to preserve Ohio's right to petition the FCC at some point in the future" ¹⁵ Ohio does not need to "preserve" this right because Section 332(c)(3)(A) of the Communications Act expressly reserves to the Commission the authority to grant States the right to regulate rates in the future. ¹⁶ Accordingly, the PUCO Statement should be denied because Ohio currently enjoys the right that it seeks to "pre-serve" (i.e., the right to petition the Commission at a later date). At the time the PUCO finds CMRS market conditions such that it can meet the statutory showing required to commence regulating rates, it can then file a petition with the Commission requesting such authority.

CONCLUSION

For the foregoing reasons, New Par respectfully

¹⁵ PUCO Statement at 6 (emphasis added). In addition, the PUCO Statement heading is "Statement of the Public Utilities Commission of Ohio's Intention to Preserve its Right for Future Rate Regulation and Market Entry Regulation of Commercial Mobile Services." Further, its introductory statement concedes that its purpose is "to ensure that federal law does not prevent the Public Utilities Commission of Ohio from deciding to assert jurisdiction over matters relating to [CMRS rate regulation] at some point in the future should that action become necessary in order to protect the interests of Ohio citizens." Id. at 1 and 2 (emphasis added).

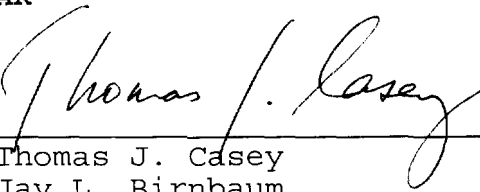
¹⁶ See 47 U.S.C. § 332(c)(3)(A).

requests that the Commission deny the PUCO Statement on an expedited basis. The Commission should also specifically confirm that the PUCO's power to regulate intra-state CMRS service rates, whether set by contracts or tariffs, and including such regulation through the review of CMRS inter-carrier contracts and complaint or other administrative proceedings, has expired.

Respectfully submitted,

NEW PAR

By:

A handwritten signature in cursive script, appearing to read "Thomas J. Casey", written over a horizontal line.

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Dated: September 19, 1994